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Supreme Court Of The United States

OCTOBER TERM, 1941

No. 653

HOTEL MARKHAM, INC., ET AL,
Petitioners,

versus

EDWARD BALL, ET AL,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

AND BRIEF IN SUPPORT THEREOF

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The petition of the Hotel Markham, Inc., A. D. Simpson, George B. Neville, W. W. Willis, Herbert Holmes, and F. N. Billingsly, individually as the members of the Bondholders' Protective Committee under an agreement executed July 1, 1930, and as the Board of Directors of the Hotel Markham, Inc., shows as follows:

Respondents herein are Edward Ball, Julius F. Stone and A. B. Weddington.

By certiorari petitioners seek review of a holding of the Fifth Circuit Court of Appeals, that a trust agreement entered into by trustees, and the formation of an operating corporation for the purpose of carrying out the duties un-

dertaken thereby, rendered a Bondholders' Protective Agreement under which the trustees acted, *functus officio,* so that the trustees were no longer bound or protected thereby, or obligated to protect the interest of minority interests; but were bound to surrender the stock and securities of the operating corporation to the beneficiaries, notwithstanding the fact that such action would place the majority holder in position to force a foreclosure or to take control without regard to the interest of the minority holders, the protective agreement and the declaration of trust both providing for distribution only when a sale should be made, or a reorganization perfected; the beneficial interest under the trust being evidenced by negotiable certificates of which Respondent herein had acquired majority control, either by purchase or option to purchase in the event he prevails in this litigation.

SHORT STATEMENT

Petitioners were made defendants in a complaint filed in a civil action by the respondent, Edward Ball. Julius F. Stone and A. B. Weddington, respondents herein, and three others not respondents, intervened in said action as co-plaintiffs. Mrs. A. M. Loeb and about twenty-three others, as certificate holders, intervened as co-defendants, seeking to have the trust preserved and the Committee control continued. (R. p. 173). On a hearing of all the issues presented, the District Court dismissed the complaint of Edward Ball and all the intervening plaintiffs. Thereupon, Edward Ball, Julius F. Stone, and A. B. Weddington prosecuted an appeal to the Circuit Court of Appeals for the Fifth Circuit, where the judgment of the District Court was reversed and the action was remanded with directions. On the action of the Circuit Court of Appeals, these petitioners seek review

by this Honorable Court by petition for certiorari, and a reversal of the judgment entered against them and the reinstatement of the judgment of the District Court.

The individual petitioners herein are the members of a Bondholders' Protective Committee, formed to take over, own and control bonds in the amount of $559,000, or the properties subjected to a lien to secure the same, of the Gulfport Hotel Company, Inc., the former owners of the Hotel Markham in Gulfport, Mississippi. Pursuant to the unlimited powers vested in these respondents by the Protective Agreement, they acquired the property by a foreclosure sale and caused the respondent, Hotel Markham, Inc., (referred to as the Trustee Corporation) to be incorporated and to issue its cumulative interest bearing debentures in the amount of the bonds and coupons deposited under the agreement, all maturing on November 1, 1940, and caused no par value stock, set up on the books of the corporation at $5.00 per share, to be issued at the rate of one share for each $100.00 of par value of bonds deposited with respondents, and conveyed the physical properties to The Trustee Corporation for operation and management. Both the debentures and the shares were placed with depositories by respondents, subject to their control under the agreement. The debentures were secured by a mortgage which provided that a completed default should occur upon default in payment of the principal of any debenture when due, whether at maturity or by declaration or otherwise, as provided; and that foreclosure might be had upon the request of the holders of 20% of the debentures unless a majority should object. The mortgage and debentures provided for redemption of debentures or refunding of the debt on November 1st or May 1st of any year prior to maturity (1940). (R. 99, 106).

Preceding the organization of the trustee corporation, a trust was declared by the individual respondents that they, as a committee, would hold the property in trust for the depositing bondholders, or their assigns, pursuant to and under the unlimited powers in the Committee Agreement; and the depository certificates were surrendered to the depositories by the original bondholders, in exchange for certificates of participation in the trust. By the terms of the above-mentioned instruments, and those related and collateral thereto, all of the rights, powers and ownership in, of, and to the physical properties were vested in the individual respondents, as trustees under the original bondholders' Protective Agreement by the ownership of the debentures and stock of the trustee corporation, in trust for the original bondholders, or their assigns, and for their equal and proportionate benefit.

Under and through the operation of the hotel properties through the Trustee Corporation, by the individual petitioners, from November 1, 1930, to November 1, 1939, the cost of purchasing additional facilities not covered by the original mortgage, necessary improvements and equipment, to the total sum of $215,004.07, were paid from operating profits. In addition $65,885 was paid against accrued interest on the debentures, most of those payments coming during the latter years of operation.

By reason of the continued depression on the Mississippi Gulf Coast, where the trust property was situated, the trustees, after repeated efforts, had failed to sell the trust property—a large hotel—at an adequate or acceptable price.

Having sufficient capital upon which to operate and to preserve the hotel properties but not having sufficient funds or capital assets to pay the principal on the debentures of

the Trustee Corporation, the individual petitioners, as the officers and stockholders, took the necessary action to enable the corporation to exercise its option under the terms of the mortgage and debentures, to refund the debt by issuing new debentures covering the principal and interest on those outstanding and in the hands of the committee. This action was necessary to prevent a default in the mortgage, pending the further efforts of the trustees to sell the trust property for distribution of the proceeds.

Respondents brought an action to enjoin issuance of the refunding debentures and require the delivery to them of the original debentures and shares of stock held in trust for them, as evidenced by a reissue of participation certificates to respondent Ball for the face value of $243,370 of original debentures and the corresponding stock in the Trustee Corporation, and by original certificates issued to the other respondents, all of which would constitute a majority of the stock and debentures. It also appeared that respondent Ball held an option to purchase other certificates which would give him majority control of both stock and debentures, in the event he should prevail in his action.

The individual petitioners and the trustee corporation defended the action under the terms of the original Bondholders' Protective Agreement, declaration of trust, mortgage, participation certificates, and their rights, powers and privileges previously conferred upon them. The District Court heard the case and rendered its written opinion that the individual respondents were vested with an uncontrolled discretion to take the proposed action to protect the trustee corporation and the trust properties, and that there had been no abuse of discretion. No formal findings of fact and con-

clusions of law were filed to affect strict conformity to Rule 52 of the Rules of Civil Procedure, but the court rendered a comprehensive opinion covering all matters in controversy.

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the court, in its majority opinion, accepted the opinion of the District Court, but reversed its findings and found that the purposes of the Protective Agreement and Declaration of Trust had been fulfilled by the organization of the trustee corporation, and that the individual petitioners had abused their discretion in attempting to refund its debentures. After reversing the judgment of the District Court, the court, in its majority opinion, directed a further consideration of any other plan that might be presented for saving the Trustee Corporation, and its obligations and properties to the committee or to the certificate holders without consideration of the fact that the time for the issuance of refunding debentures had expired, and the mortgage on the trust properties was subject to immediate foreclosure; and that if the right to possession of the stock and debentures had passed to the certificate holders, petitioners and minority certificate holders would have no further rights and powers under the protective agreement or the trust agreement, but that all power would have passed to respondents herein, subject only to such control as the court might have in the exercise of its powers as a court of equity, and under appropriate process, thereby placing the minority certificate holders in exactly the position they sought to escape by joining in the protective agreement and assenting to the trust.

The majority opinion of the Circuit Court establishes the law of the case for further proceedings on remand and requires the District Court either to terminate the trust